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IN THE

**Supreme Court of the United States**

**October Term, 1978**

**No. 78-1083**

**HARVEY S. KORNIT,**

*Petitioner,*

*against*

**BOARD OF EDUCATION of the  
PLAINVIEW-OLD BETHPAGE SCHOOL DISTRICT  
PLAINVIEW, NEW YORK,**

*Respondent.*

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**PETITION (WITH APPENDICES) FOR A WRIT OF  
CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE SECOND CIRCUIT**

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**PETITION (WITH APPENDICES) FOR A WRIT OF  
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OF APPEALS FOR THE SECOND CIRCUIT**

The petitioner, Harvey S. Kornit, prays that a writ of certiorari be issued to review the final judgment of the United States Court of Appeals for the Second Circuit, upon remand from the Supreme Court of the United States, entered in the Office of the Clerk on October 4, 1978. A Petition for Rehearing was submitted to the United States Court of Appeals for the Second Circuit on October 16, 1978. The Petition for Rehearing was denied on November 14, 1978.

**Opinions Below**

The Decision of the United States District Court for the Eastern District of New York is not reported and is reproduced as Appendix I, *infra* at 1a-5a. The Opinion of

the District Court denying a motion to amend defendant parties is unreported and is reproduced as Appendix II, *infra* at 6a-7a. The Opinion of the United States Court of Appeals for the Second Circuit remanding this action with instructions to dismiss for lack of subject matter jurisdiction is reported at 542 F.2d 592 (2d Cir. 1976) and is reproduced as Appendix III, *infra* at 8a-11a. The Order of the United States Court of Appeals for the Second Circuit denying a Petition for Rehearing is not reported and is reproduced as Appendix IV, *infra* at 12a. The Order of the United States District Court for the Eastern District of New York dismissing this action for lack of subject matter jurisdiction is unreported and is reproduced as Appendix V, *infra* at 13a.

The action, in a Petition for a Writ of Certiorari, was brought to the Supreme Court of the United States, which, in a Memorandum Decision, granted certiorari and vacated the Decision of the United States Court of Appeals on June 26, 1978, for further consideration in light of *Monell v. Dep't. of Social Services of the City of New York*, 436 U.S. (1978) Circuit. The Decision of the Supreme Court of the United States is reported at 436 U.S. — (1978) and is reproduced as Appendix VI, *infra* at 14a.

The Order of the United States Court of Appeals for the Second Circuit vacating the Judgment and mandate is not reported, and is reproduced as Appendix VII, *infra* at 15a-16a. The Decision of the United States Court of Appeals for the Second Circuit affirming the Decision of the United States District Court for the Eastern District of New York is not reported, and is reproduced as Appendix VIII, *infra* at 17a-18a. The Order of the United States Court of Appeals for the Second Circuit denying a Petition for Rehearing is unreported and is reproduced as Appendix IX, *infra* at 19a.

## Jurisdiction

The United States Court of Appeals for the Second Circuit rendered its original Judgment remanding with instructions to dismiss because of a lack of subject matter jurisdiction on September 15, 1976. A Petition for Rehearing submitted on September 19, 1976 was denied July 19, 1977. A Petition for a Writ of Certiorari was submitted to the Supreme Court of the United States on October 8, 1977, and, on June 26, 1978, the Court granted certiorari, vacating the original Judgment of the Court of Appeals. Upon remand the Court of Appeals, on October 4, 1978, affirmed the Decision of the United States District Court for the Eastern District of New York, which had originally dismissed this action on substantive grounds. A Petition for Rehearing submitted on October 16, 1978 was denied on November 14, 1978. The jurisdiction of the Supreme Court of the United States is requested under 28 U.S.C. § 1254(1).

Substantial Federal constitutional questions remain unresolved as well as a significant conflict of interpretation between the United States Court of Appeals for the Second Circuit and the United States Tax Court regarding indebtedness and garnishment of earned wages.

## Questions Presented

1. Whether the New York State Taylor Law, New York Civil Service Laws, Sections 200-14, as amended in 1969, is unconstitutional since it authorizes officials of a board of education with a vested and substantial pecuniary interest to make determinations of guilt or innocence of employees alleged to have participated in a work stoppage, such determinations of guilt resulting in the illegal and excessive garnishment by officials of the board of education of duly earned wages for work actually performed, deducted

from wages earned in payment of penalties imposed, in violation of petitioner's civil rights under the Due Process Clause of the Fourteenth Amendment of the United States Constitution as defined in statute under the Civil Rights Act of 1871, 42 U.S.C. § 1983.

2. Whether the Superintendent of Schools and the Acting Superintendent of Schools, acting as officials of the Plainview-Old Bethpage School District had a pecuniary interest sufficient to disqualify them from acting in a position of adjudication of finality which led to the garnishment of earned wages for work performed from the salaries of the petitioner, a teacher in the School District, and others, such penalties deducted significantly and substantially benefiting the budgetary needs of the School District, in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

3. Whether the School Business Administrator of the Plainview-Old Bethpage School District acted in an unconstitutional and unlawful manner when he garnished the earned wages of petitioner without a lawful court order of execution of garnishment and in an amount far in excess of the limitations of the Federal Wage Garnishment Law, in violation of the Fourth Amendment of the United States Constitution and the Eighth Amendment of the United States Constitution.

4. Whether the New York State Taylor Law, Civil Service Laws, Section 200-14, as amended in 1969, places an unfair and extraordinary burden on the collective bargaining process by offering to school districts free unpaid labor through the adjudication by officials of the boards of education with a pecuniary interest should a contract not be reached and should a work stoppage occur.

5. Whether the New York State Taylor Law, Civil Service Law, Section 200-14, as amended in 1969, created an

extra-legal system which is in conflict with the Federal Internal Revenue Code and Social Security Laws so that through ambiguity the Plainview-Old Bethpage School District has acted in violation thereof, by not crediting duly earned wages to the account of employees and by not making proper and timely payments of income withholding taxes and Social Security taxes.

6. Whether the complaint to the United States District Court for the Eastern District of New York stated a cause of action because of the lack of Constitutional Due Process and the violation of petitioner's civil rights under the Due Process Clause of Fourteenth Amendment to the United States Constitution when his duly earned wages for work performed were garnished from his salary by parties with a pecuniary interest, without a lawful court, and in violation of the limitations of the Federal Wage Garnishment Law.

### **Statutes Involved**

**Federal Civil Rights Act of 1871 § 1; 42 U.S.C. 1983 (1970).**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

**Federal Wage Garnishment Act; 15 U.S.C. §§ 1672, 1673. (Effective July 1, 1970)**

#### **§ 1672. Definitions**

For the purpose of this title:

(a) The term "earnings" means compensation paid or payable for personal services, whether denominated as wages,

salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.

(b) The term "disposable earnings" means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld.

(c) The term "garnishment" means any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt.

#### § 1673. Restrictions on Garnishment

(a) Except as provided in subsection (b) and in section 1675, the maximum part of the aggregate disposable earnings of an individual for any work week which is subjected to garnishment may not exceed

(1) 25 per centum of his disposable earnings for that week, or

(2) the amount by which is disposable earnings for that week exceed thirty times the Federal minimum hourly wage prescribed by section 6(a)(1) of the Fair Labor Standards Act of 1938 in effect at the time the earnings are payable, whichever is less. In the case of earnings for any pay period other than a week, the Secretary of Labor shall by regulation prescribe a multiple of the Federal minimum hourly wage equivalent in effect to that set forth in paragraph (2)

(b) The restrictions of subsection (a) do not apply in the case of

(1) any order of any court for the support of any person.

(2) any order of any court of bankruptcy under Chapter XIII of the Bankruptcy Act.

(3) any debt due for any State or Federal tax.

(c) No court of the United States or any State, *and no State (or officer or agency thereof)* may make execute, or enforce any order or process in violation of this section." \*

**New York State Taylor Law** (New York Public Employees' Fair Employment Act) 1967, as amended in 1969 to include 2 for 1 penalty, effective April 1, 1969. Civil Service Law Chapter 200-14. Pertinent parts:

§ 210. 1. No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage, or condone a strike.

§ 210. 2. (d) Determination. In the event that it appears that a violation of this subdivision may have occurred, the chief executive officer of the government involved shall, on the basis of such investigation and affidavits as he may deem appropriate, determine whether or not such violation has occurred and the date or dates of such violation. If the chief executive officer determines that such violation has occurred, he shall further determine, on the basis of such further investigation and affidavits as he may deem appropriate, the names of employees who committed such violation and the date or dates thereof. Such determinations shall not be final until the completion of the procedures provided for in this subdivision.

§ 210. 2. (e) Notice. The chief executive officer shall forthwith notify each employee that he has been found to have committed such violation the date or dates thereof and of his right to object to such determination pursuant to paragraph (h) of this subdivision; he shall also notify the

\* Italicized part of § 1673 (c) added as per amendment; Public Law 95-30, Title V, § 501(e)(3), May 23, 1977, 91 Stat. 161,162.

chief fiscal officer of the names of all such employees and of the total number of days, or part thereof, on which it has been determined that such violation occurred. Notice to each employee shall be by personal service or by certified mail to his last address filed by him with his employer.

§ 210. 2. (g) Payroll deductions. Not earlier than thirty nor later than ninety days following the date of such determination, the chief fiscal officer of the government involved shall deduct from the compensation of each such public employee an amount equal to twice his daily rate of pay for each day or part thereof that it was determined that he had violated this subdivision, such rate of pay to be computed as of the time of such violation. (Technical part omitted)

§ 210. 2. (h) Objections and restoration. Any employee determined to have violated this subdivision may object to such determination by filing with the chief executive officer, (within twenty days of the date on which notice was served or mailed to him pursuant to paragraph (e) of this subdivision) his sworn affidavit, supported by available documentary proof, containing a short and plain statement of the facts upon which he relies to show that such determination was incorrect. Such affidavit shall be subject to the penalties of perjury. If the chief executive officer shall determine that the affidavit and supporting proof establishes that the employee did not violate this subdivision, he shall sustain the objection. If the chief executive officer shall determine that the affidavit and supporting proof fails to establish that the employee did not violate this subdivision, he shall dismiss the objection and so notify the employee. If the chief executive officer shall determine that the affidavit and supporting proof raises a question of fact which, if resolved in favor of the employee, would establish that the employee did not violate this subsection, he shall

appoint a hearing officer to determine whether in fact the employee did violate this subdivision after a hearing at which such employee shall bear the burden of proof. If the hearing officer shall determine that the employee failed to establish that he did not violate this subdivision, the chief executive officer shall so notify the employee. If the chief executive officer sustains an objection or the hearing officer determines on a preponderance of the evidence that such employee did not violate this subdivision, the chief executive officer shall forthwith restore to the employee the tenure, suspended pursuant to paragraph (f) of this subdivision, and notify the chief fiscal officer who shall cease all further deductions and refund any deductions previously made pursuant to this subdivision. The determinations provided in this paragraph shall be reviewable pursuant to article seventy-eight of the civil practice law and rules.

### Statement of the Case

The plaintiff in this action is a Social Studies teacher in the Plainview-Old Bethpage School District on Long Island in New York State. The defendant is the Board of Education, whose members acting as a body corporate are the administrative trustees of the Plainview-Old Bethpage School District.

In September of 1972 a four-day work stoppage took place at the School District. The plaintiff does not deny his involvement in this work stoppage, but contends that the penalty provisions of the New York State Taylor Law which authorized the administrative judicial proceedings that followed the work stoppage allowing officials of the Board of Education with a substantial and vested pecuniary interest to make determinations of guilt, and which authorized the deduction of penalties from employees' earned wages for

work performed, may be a significant factor which caused the advent of the work stoppage in the first instance. In addition wages were garnished in violation of the limitations of the Federal Wage Garnishment Law and without a prior impartial hearing.

In his complaint filed on April 5, 1975 in the United States District Court for the Eastern District of New York, plaintiff challenged, on constitutional grounds, the New York State Taylor Law sections which allowed those administrative judicial proceedings as well as the actual proceedings which took place. Jurisdiction was initially based on the Fourteenth Amendment to the United States Constitution and on both 42 U.S.C. § 1983 and 28 U.S.C. § 1343.

In a Memorandum and Order, decided July 22, 1975, the District Court, the late Honorable Orrin G. Judd, granted defendant's motion to dismiss the action on substantive grounds, not ruling on the jurisdictional question, 1a-5a.

An appeal was begun to the United States Court of Appeals for the Second Circuit on September 17, 1975, after plaintiff was granted an extension of time to file on motion to the District Court. On May 11, 1976 a motion by plaintiff to amend the defendant parties was denied by the District Court, the late Honorable Orrin G. Judd, in a Memorandum and Order, 6a-7a.

On September 15, 1976, the United States Court of Appeals for the Second Circuit vacated the Judgment of the District Court with instructions to dismiss for lack of subject matter jurisdiction, 8a-11a.

On July 19, 1977, the original panel at the United States Court of Appeals for the Second Circuit denied plaintiff's Petition for Rehearing, 12a.

On September 15, 1977, an Order was issued by the District Court, pursuant to the Decision of the Court of Ap-

peals for the Second Circuit, whereby the action was dismissed for lack of subject matter jurisdiction, 13a.

On October 8, 1977, the plaintiff filed a Petition for a Writ of Certiorari in the Supreme Court of the United States. The Supreme Court of the United States granted the petition for a writ of certiorari in a Memorandum Decision on June 26, 1978. The Judgment of the United States Court of Appeals for the Second Circuit was vacated and the case was remanded for further consideration in light of *Monell v. Department of Social Services of the City of New York*, 436 U.S. (1978). Memorandum Decision, 14a.

The United States Court of Appeals, on July 28, 1978, issued an Order vacating its Judgment and Mandate of September 15, 1976, which had instructed the District Court to dismiss the action because of the lack of subject matter jurisdiction, 15a-16a.

The United States Court of Appeals, on October 4, 1978, upon submission, issued an Order vacating its Judgment of September 15, 1976, and affirmed the Decision of the District Court, the late Honorable Orrin G. Judd, against the plaintiff on the substantive matter, 17a-18a.

On November 14, 1978, the original panel of the United States Court of Appeals for the Second Circuit denied a Petition for Rehearing submitted by the plaintiff, 19a.

## Reasons for Granting the Writ

### I.

In holding that suit, brought under 42 U.S.C. § 1983 because of a violation of the Due Process Clause of the Fourteenth Amendment, should be dismissed, even though plaintiff has indicated the clear pecuniary interest of the adjudi-

cating parties, namely the Superintendent of Schools and the Acting Superintendent of Schools, who acting as officials of the defendant Board of Education were not impartial adjudicators in matters which would lead to the garnishment of plaintiff's earned wages for work performed in violation of the Court's Decision in *Sniadach v. Family Finance Corporation of Bayview*, 395 U.S. 337 (1969), and the Federal Wage Garnishment Law, 15 U.S.C. §§ 1672, 1673.

This action has been brought on constitutional grounds within jurisdiction of the Federal courts, but human logic plays an important role in the various aspects of this action. Under the New York State Taylor Law a school district and its employees are required to bargain collectively in order to reach a contractual agreement. However the New York State Taylor Law penalty provisions (Amendments of 1969) also state that the school district employer may fine the employee two days' penalty after adjudication by officials of the School District, if an agreement is not reached and a strike does occur for each day that an employee is not at work. Thus what may be a threat to and penalty for the employee becomes a potential contingent reward to the employer which places an unfair and extraordinary burden on the collective bargaining process. Although this petitioner feels that the loss of all wages, whether earned or not, would not have necessarily occurred had this temptation not existed, he has brought suit only to recover that part of his wages for work performed which were garnished without a lawful court order.

### 1. Administrative Judicial Proceedings

The adjudication of school district employees alleged to have been involved in a work stoppage is conducted by the superintendent of schools by mail. Objections to his determination must be made by mail in an affidavit signed by

the employee. The superintendent of schools may find the individual guilty or innocent on the basis of the affidavit, or the superintendent can refer the matter concerning an individual to a hearing officer. The hearing officer is appointed contractually by the board of education and/or superintendent of schools and is paid school district funds. The hearing officer may or may not be a lawyer, although an attorney was hired by the Plainview-Old Bethpage School District for those individuals who were granted hearings. The hearing officer is not an employee of New York State and since he is not chosen bilaterally, as is an arbitrator by the school district and the bargaining agent, he certainly has no juridical authority in accordance with Constitutional Due Process to make judicial determinations which will lead to the garnishment of duly earned wages of New York State employees. A superintendent of schools is also disqualified as an adjudicator because he has a indirect pecuniary interest in his capacity as an official of the board of education which has a direct and corporate pecuniary interest.

Therein lies the conflict of interest. The Superintendent of Schools, who as chief executive officer of the School District is empowered under the Taylor Law penalty provisions to make judicial determinations of guilt or innocence, is also responsible for the preparation of the Superintendent's Budget for examination and any revision by the Board of Education before the budget is submitted to School District voters. Thus the Board of Education, the trustees of the funds of the School District, and the Superintendent of Schools, as an agent of the Board have a vested pecuniary interest in the determination of guilt or innocence.

One may consider guilt to be obvious *ex post facto*, so it does not matter who the judge is. However it is not only a violation of Constitutional Due Process, but the judicial in-

volvement of someone with an obvious substantial pecuniary interest may be a major cause for the work stoppage to have occurred. Collective bargaining negotiations are a delicate matter. The temptation of financial inducements to a board of education and the authorization for the board of education to hold administrative proceedings to financially penalize employees is counter-productive to the purpose of the original sections of the Taylor Law.

It is clearly obvious that no work stoppage occurs after the signing of a contract. The Taylor Law penalty provisions by offering a school district free unpaid labor, should a contract not be signed and should a work stoppage occur, create, not only a vested pecuniary interest at the adjudication level, but a contingent pecuniary interest during the contractual negotiations which can only influence and impede the settlement of those negotiations, *ab initio*.

In the current action, 641 persons are alleged to have participated in a work stoppage, of whom 68 persons filed the requested affidavits. Of these 68 persons the Acting Superintendent of Schools determined that 22 persons were innocent. The Acting Superintendent also determined that 9 persons were guilty. The Acting Superintendent referred 37 individuals to a hearing before the unilaterally appointed hearing officer. The decisions in these instances is unknown to the petitioner. In addition the Acting Superintendent of Schools found guilty those 573 employees "who chose not to properly avail themselves of the aforementioned procedure." The petitioner was among this group, which, under instructions from the bargaining agent, requested a fair hearing but was denied any hearing before or after the garnishment of earned wages for work performed.

An appeal under Article 78 from the administrative proceedings of the School District does not meet the requirements of Constitutional Due Process since that appeal

comes "after the taking" of wages and the appeal has been tainted and prejudiced through previous administrative proceedings by parties with a vested pecuniary interest.

The judicial procedures under the Taylor Law penalty provisions are in direct violation of the principle of *Tumey v. Ohio*, 273 U.S. 510 (1927) and *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), which indicates that a person with a substantial pecuniary interest, whether personal and direct, or indirect as a major responsibility for instrumentality budget preparation, cannot act in a judicial capacity.

In addition, *Ward v. Village of Monroeville, Ohio, supra*, defines another applicable principle: that the court of instance and finality must be as impartial as any subsequent court of appeal and a lack of competency is not excused because a review or trial *de novo* is available.

*Gibson v. Berryhill*, 411 U.S. 564 (1973), indicates that both of these principles are applicable to administrative proceedings. It must be noted that the Taylor Law penalty provisions state a specific time within which deductions from earned salary are to be executed. These deductions are not stayed pending or during a hearing or Article 78 appeal.

The *obiter dictum* of the Decision of the United States Supreme Court in *Hortonville Joint School District No. 1 v. Hortonville Education Assn.*, 426 U.S. 482 (1976), in Point II, Part B, first paragraph, at 426 U.S. 491-2, indicated that if there were a financial conflict of interest on the part of the Board of Education in that case, there would apparently be a conflict of interest in the decision making process. The United States Supreme Court found no pecuniary interest in the subject matter directly before the Court in the *Hortonville, supra*, action, but the current matter has all of

the pecuniary ingredients mentioned in the *obiter dictum* of the *Hortonville, supra*, Decision. Officials, acting as agents of the Board of Education would, by an extension of logic, be disqualified because of the same conflict of interest in the administrative adjudication process.

The recent Decision of the United States Supreme Court in *Monell v. Department of Social Services of the City of New York*, 436 U.S. (1978), gives added strength to the petitioner's suit. The Decisions below indicated that *Gibson v. Berryhill, supra*, was not applicable since the Superintendent of Schools did not have a *personal* pecuniary interest in his adjudicating capacity. The Decision in *Monell, supra*, may have made this holding academic, for *Monell* indicates that a board of education is a *person* for purposes of 42 U.S.C. 1983. Therefore the pecuniary interest of the Board of Education, as a corporate body, in the adjudication process conducted by its agent, the Superintendent of Schools, would be *personal* and *direct*. Such a personal and direct pecuniary interest in the adjudication process would be violative of 42 U.S.C. 1983 and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Cases concerning the New York State Taylor Law were presented before the United States Supreme Court and were decided on May 13, 1974. These parallel actions were *Sanford v. Wilson*, 416 U.S. 977 (1974) and *Collins v. Wilson*, 416 U.S. 977 (1974). These cases were appeals from the New York State Court of Appeals. This Court vacated the judgments and remanded the cases to the New York Court of Appeals for further consideration in light of *Arnett v. Kennedy*, 416 U.S. 134 (1974). Upon remand, the Court of Appeals of New York State reaffirmed its Decision in both actions on December 19, 1974. 35 N.Y.2d 547. The petitioners returned to the United States Supreme Court

and in a Memorandum Decision the appeals were dismissed for want of a substantial federal question. Mr. Justice Douglas, Mr. Justice White and Mr. Justice Marshall indicated that they would note probable jurisdiction and would set the case for oral argument. 421 U.S. 973 (1975).

The current action adds two significant dimensions which were not present in *Arnett v. Kennedy, supra*. That action did not involve the pecuniary interest on the part of a decision maker nor did it involve the garnishment by the immediate employer of earned wages for work performed. The current action has both of these aspects clearly present and this case should be judged on its own merits.

## **2. Binding Arbitration for Policemen and Firemen**

A new dimension was added to the unconstitutionality of the New York State Taylor Law in 1974. Amendments to Section 209 of the Taylor Law (Chapters 724 and 725 of the New York State Laws of 1974) bifurcated the Taylor Law in such a manner as to deny teachers and others the equal protection of the law as required by 42 U.S.C. 1983 and the Fourteenth Amendment to the United States Constitution.

The Amendments to Section 209 of the Taylor Law require that instrumentalities of New York State and their policemen and firemen employees enter into binding arbitration if agreement cannot otherwise be reached in contractual negotiations.

The cities of Amsterdam and Buffalo brought suit to declare the Amendments of 1974 unconstitutional because of a violation of the Home Rule provisions of the New York State Constitution (Art IX, § 2, Subd (c)). The New York State Court of Appeals decided on June 5, 1975, in *City of Amsterdam v. Robert D. Helsby*, combined with *City of*

*Buffalo v. New York State Public Employment Relations Board*, 37 NY2d 19 (1975) that the Amendments were constitutional. The Amendments are currently part of the New York State Taylor Law.

Although the Taylor Law is a general law in regard to all employees of New York State and the civil adjudicative proceedings and financial penalties as well as possible criminal penalties remain the same for *all* employees in case of a strike, the procedures in regard to instrumentalities and their policemen and firemen employees created by the Amendments of 1974 virtually eliminate the possibility that a work stoppage might be resorted to by policemen and firemen. The arbitrator is directed under the Amendments of 1974 to take into account the financial ability of the instrumentality as well as the financial needs of the employee.

Thus the bifurcation of the Taylor Law creates a situation in which, *in theory*, all employees are subject to the financial and criminal penalties of the Taylor Law penalty provisions, but *in practice* one class of employees, namely policemen and firemen, are protected from that eventuality by the requirement upon them and their instrumentality employer to go to binding arbitration. Even in consideration of the difficult and dangerous work of policemen and firemen, it is unfair and unconstitutional to deny teachers and others and their government employers the same fair and equitable procedure. As the Amendments of 1969 created a violation of the Due Process Clause of the Fourteenth Amendment, so the Amendments of 1974 create a violation of the Equal Protection Clause of the Fourteenth Amendment.

The New York State Court of Appeals in *City of Amsterdam v. Helsby*, *supra*, found the Amendments of 1974 to be constitutional since the Taylor Law was a general law and the Amendments were applicable to *all instrumentalities* of

New York State. However the Taylor Law was a general law since it was applicable, as well, to *all employees*. Since the Amendments of 1974 do not include teachers and others, so that they are afforded this vital procedure in resolving disputes through binding arbitration, it is clear that the Taylor Law is not enforced equally for the protection of all employees.

Although the Amendments of 1974 did not exist at the time of the work stoppage in the current matter before the Court, their passage subsequently by the New York State Legislature indicates that the Amendments of 1969 were considered ineffective and unfair. If binding arbitration is fair and equitable for one class of employees covered by the general Taylor Law, then in all fairness it should have been extended to all employees. That decision is a legislative one. However the denial of binding arbitration to teachers and others within the framework of the Taylor Law is a judicial matter, and bears examination.

If the Taylor Law penalty provisions (Amendments of 1969) were found unconstitutional by this Court as here sought by petitioner in the writ, the Amendments of 1974 requiring binding arbitration for instrumentalities and their policemen and firemen employees would remain intact.

Thus the bifurcation of the Taylor Law has created a situation in one class of employees is treated quite differently than the other. For one class of employees, because of the Amendments of 1974, the fair and equitable resolution of labor disputes is made possible. For the other class of employees, because of the Amendments of 1969, the fair and equitable resolution of labor disputes is made virtually impossible for the reasons previously indicated.

For the above stated reasons the writ here sought should be granted. Alternatively, the Decision below should be

vacated and remanded for reconsideration, or the Supreme Court could remand the matter to the United States District Court for the Eastern District of New York for a plenary hearing.

## II.

In holding that the deductions made under the Taylor Law penalty provisions were not garnishments, even though the deductions were made from earned wages for work performed in violation of *Sniadach v. Family Finance Corporation of Bayview*, 395 U.S. 337 (1969), which requires notice and hearing, and in clear violation of the limitations of the Federal Wage Garnishment Law, 15 U.S.C. § 1673(a).

### 1. Garnishment of Earned Wages

If a hearing were held by the Board of Education before the garnishment of earned wages, the hearing would not meet constitutional requirements because of the vested pecuniary interest of the Board of Education and the Superintendent of School as its agent. Similarly the summary administrative proceedings are a violation of Constitutional Due Process and the *Sniadach, supra*, rule.

The garnishments made under the Taylor Law cannot be considered as exempt from the limitations of the Federal Wage Garnishment Law as "amounts required by law to be withheld." (15 U.S.C. § 1672(b)). To do so would be to declare the Federal Wage Garnishment Law null and void. In fact the Taylor Law penalty provisions are an unconstitutional and illegal circumvention of the Federal Wage Garnishment Law. Legal garnishments themselves are conducted *according to law*. The test is whether there is "any legal or equitable procedure" and whether "the earnings of any individual are required to be withheld for the payment of any debt." The "legal or equitable procedure" were the

administrative proceedings conducted by the Superintendent of Schools and the Acting Superintendent of Schools and the "debt" is the amount of indebtedness created by the judicial determinations of those proceedings.

The Decision of the United States Court of Appeals for the Second Circuit in the current action is in conflict with the Decision of the United States Tax Court in *Tucker v. Commissioner of Internal Revenue*, 69 T.C. No. 5, Page 675, Docket No. 7971-75, decided February 8, 1978, as to whether deductions under the Taylor Law penalty provisions are a garnishment of earned wages.

The United States Tax Court in the *Tucker* Decision, in part, at 678, stated:

"It is clear that when Carol engaged in an illegal strike she incurred an indebtedness because of the penalty specified by the Taylor Law. This debt was satisfied when, upon her return to work, the School District withheld a portion of her normal salary corresponding to the amount of her indebtedness. This procedure is analogous to a garnishment of wages commonly used by creditors as a collection mechanism."

The United States Court of Appeals for the Second Circuit in its Decision of October 4, 1978 in the current action, in part, stated:

"The procedure provided by N.Y. Civil Service Law § 210 does not amount to a garnishment without hearing or court order in violation of *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969)."

The penalties imposed under the Taylor Law may be considered statutory in amount, but their imposition requires judicial determinations by the Superintendent of Schools that a "strike" has taken place and that the indi-

vidual involved was a participant. The deductions under the Taylor Law clearly meet the garnishment definition of the Federal Wage Garnishment Law. The violation of the *Sniadach, supra*, rule occurs because of two reasons. The Board of Education and the Superintendent of Schools cannot, due to a vested pecuniary interest, adjudicate the matter fairly. Secondly legal garnishments of wages can only be done by the courts of law empowered to do so. The United States Department of Labor in its booklet, *The Federal Wage Garnishment Law*, WH Publication 1324, (Revised February 1978), in part, states on Page 11:

"An individual's earnings are 'subjected to garnishment' for purposes of this law when the garnishee (employer) withholds earnings pursuant to a garnishment order."

Thus the Department of Labor indicates that it considers that it is not bound to enforce the limitations of the Federal Wage Garnishment Law if the garnishment is not directed by a court which issues garnishment orders. Under the Taylor Law, generally excessive deductions of salary are made even though Section 1673 (c) of the Federal Wage Garnishment Law states:

"No court of the United States or any State, and no State (or officer or agency thereof) may make, execute, or enforce any order or process in violation of this section."

The excessive garnishments under the Taylor Law, frequently deducting more than sixty, seventy, eighty or ninety percent of disposable salary for periods up to two months, serve no legitimate governmental purpose and are so far beyond the bounds of civilized standards that they would be unjustified even if they did serve some purpose.

The fact that these excessive deductions are permitted without any regard for human dignity or basic human needs lends added credence that the deductions, even if they were not excessive, are made in a manner which supports the contention that the adjudication and execution procedures of the Taylor Law penalty provisions are in total violation of the Due Process Clause of the Fourteenth Amendment. The penalty provisions also illegally circumvent the letter and spirit of the Federal Wage Garnishment Law by authorizing garnishments of earned wages in excess of the limitations allowed by that law.

The administrative judicial procedures under the Taylor Law penalty provisions impair respect for the judiciary of New York State. The courts of New York State in Article 78 appeals are put into the position of acting as "silent partners" in the overt violation of the Due Process Clause of the Fourteenth Amendment by boards of education in the adjudication process and in the violation of the limitations of the Federal Wage Garnishment Law. No court of New York State would directly order the execution of a garnishment which deprived an individual of almost all of his income for a period of time, and yet the courts of New York State have condoned the execution of such attachments by boards of education. The New York State courts remain virtually trapped in a situation in which, when they affirm the administrative proceedings of a board of education, they simultaneously, *ex post facto*, approve of what are generally excessive and illegal garnishments.

The Federal Wage Garnishment Law is not limited to commercial transactions and is fully applicable to the garnishment of wages for the payment of penalties. If the Federal Wage Garnishment Law were restricted to commercial transactions there would have been no need for the Law to indicate the three categories, all government im-

posed, which are exempt. The exempt categories are court orders for the support of a person, bankruptcy court orders, and debts due for any State or Federal Taxes. All of the deductions in these three categories are conducted in a manner which affords Constitutional Due Process and affords specific protections to the individual's earned wages. The Taylor Law penalty provisions afford no protection whatsoever to the earned wages of an individual and the penalty provisions do not fit into any of the exempt categories. The deductions made under the Taylor Law, based on the adjudication of an incident prior to the earning of the wages from which the penalties are deducted cannot be considered the normal "deductions under law" such as income tax or social security tax deductions which are based directly and proportionally on the amount of the earned wages, and which are not confiscatory. The Taylor Law deductions are not based proportionally, are not directly related to the earned income, and are an illegal attachment on future earnings.

Thus duly earned wages for services fully rendered become subject to garnishment for penalties invoked because of an incident prior to the earning of these wages, and yet the wages remain outside constitutional protection in regard to the summary adjudication procedures by the government employer, and the wages remain outside the protection of the limitations of the Federal Wage Garnishment Law in regard to the excessive deductions which tend to be the rule.

In *Feinberg v. Board of Education of the City of New York*, 344 N.Y.S. 2d 618 (1973), affirmed 51 A.D.2d 548 (1976), the Supreme Court of New York State, County of Kings, indicated that Court's concern with excessive garnishment from the wages of a government employee by a

government instrumentality which itself claimed the garnished funds, because of an overpayment through error of summer vacation pay. The decision was also concerned with the evasion of the "legal machinery for the enforcement of claims against wages." The Court found against the Board of Education. In part the Decision stated, quoting from *In Matter of Jones (Peter Pan Products)*, affd. 14 N.Y. 2d 558, 248 N.Y.S. 2d 652:

"It is not reasonably to be expected that a worker is to continue to provide the necessities of life without the benefit of any of the wages he earns, even though the indebtedness upon which the wages are all taken is entirely just and incurred through the fault or neglect of the worker himself. No industrial society tolerates the total deprivation of future earnings for the collection of a debt; and all legal machinery for the enforcement of claims against wages allows some toleration for the minimal needs of the employee while he works off the debt."

The fact that the New York Taylor Law penalty provisions authorize excessive deductions from earned wages in overt violation of the letter and spirit of the Federal Wage Garnishment Law serves to support the contention of the petitioner that the penalty provisions, in their entirety, are outside the realm of constitutionality. To the violation of the Due Process Clause of the Fourteenth Amendment because of the administrative judicial proceedings by parties with a vested pecuniary interest, must be added violations of the Fourth Amendment because of the deprivation of property in the form of earned wages without a lawful court garnishment order, and of the Eighth Amendment because of the cruel excessive attachments executed in violation of the Federal Wage Garnishment Law.

## 2. Tax Deductions and Payments

Garnishments, legally, are within the realm of the courts. Any deviation from that requirement is violative of the United States Constitution, especially in regard to the Due Process Clause of the Fourteenth Amendment. Such deviations under the New York State Taylor Law penalty provisions, the Amendments of 1969, have not only resulted in a violation of the Federal Wage Garnishment Law because of excessive and cruel attachments of earned wages, but other Federal laws have been violated. Internal Revenue and Social Security Laws have been circumvented. The Plainview-Old Bethpage School District, and perhaps other school districts, did not credit employees with their full gross earnings before making deductions under the Taylor Law penalty provisions. The School District interpreted Section 210.2(g) of the Taylor Law penalty provisions as authorizing deductions to be made as a forfeiture of salary. In this manner, not only was the Federal Wage Garnishment Law circumvented, but Federal income taxes and Social Security taxes, whether due from the employee or employer, were not paid. Even in school districts which did credit the true gross earnings of employees and made the proper tax payments, there has been a universal disregard for the garnishment limitations imposed by the Federal Wage Garnishment Law.

It is impossible to determine how many thousands or millions of dollars in income and Social Security taxes have been lost in total by the Federal government. It is not entirely strange that the unconstitutional Taylor Law penalty provisions have had a multitude of illegal ramifications in other areas.

Thus the Taylor Law penalty provisions allow persons with pecuniary interest to make determinations of guilt or innocence as to violations of the New York State Taylor Law, and allows the same parties to make deductions from

earned wages without a prior impartial hearing and in violation of the limitations of the Federal Wage Garnishment Law. In addition the Taylor Law penalty provisions (Amendments of 1969) place an unfair and extraordinary burden on the collective bargaining process by offering to school districts free unpaid labor if no collective bargaining agreement is reached and a work stoppage does occur. The advance knowledge by agents of a board of education that they will "hold court" in the first instance of finality can also affect the collective bargaining process so that a contractual agreement would not be signed and a work stoppage might more likely occur.

On their face and as applied the Taylor Law penalty provisions are repugnant to the United States Constitution.

If the Court decides not to vacate and remand this case (or grant the writ) as suggested in Point I, *supra*, it is respectfully urged that the writ should be granted for the reasons urged in this point. Alternatively, the Supreme Court could remand the matter to the United States District Court for the Eastern District of New York for a plenary hearing as requested in Point I.

## CONCLUSION

**For all of the foregoing reasons this petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted and the judgment in this case should be vacated and remanded for further proceedings.**

Respectfully submitted,

HARVEY S. KORNIT

*Petitioner Pro Se*

70-25 Yellowstone Boulevard

Forest Hills, New York 11375

Tel. No. 212-261-8578

## **APPENDICES**

**APPENDIX I**

**UNITED STATES DISTRICT COURT**

**EASTERN DISTRICT OF NEW YORK**

---

**HARVEY S. KORIT,**

**Plaintiff,**

**v.**

**BOARD OF EDUCATION, PLAINVIEW-OLD BETHPAGE  
SCHOOL DISTRICT, NEW YORK,**

**Defendant.**

---

**No. 75 Civ. 518**

**Decided July 22, 1975**

---

**HARVEY S. KORIT,**  
*pro se*, Plaintiff

**JOSEPH W. CAMPANELLA, ESQ.**  
Attorney for Defendant

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**The Late HONORABLE ORRIN G. JUDD,**  
District Judge

---

**JUDD, J.:**

**MEMORANDUM AND ORDER**

Defendant has moved to dismiss this civil rights action for improper service and for failure to state a valid claim.

## Appendix I

**Facts**

Plaintiff, a social studies teacher employed by the defendant Board of Education, sues to recover \$379.84 deducted from his salary as a penalty because of his participation in an illegal strike. He also seeks a determination that the Taylor Law (New York Civil Service Law § 210) is unconstitutional in permitting a deduction from wages without prior hearing.

The summons and complaint was served on an assistant bookkeeper of the Board of Education by a Deputy United States Marshal.

The complaint is 30 pages long with much more argument than facts. Plaintiff alleges that he took part in a four-day work stoppage on September 6, 7, 8 and 11, 1972.

He was notified on September 27, 1972 by the Superintendent of Schools that the Superintendent had determined that his absence constituted participation in a strike, in violation of Section 210(2)(h) of the Civil Service Law, but that he might file an affidavit within twenty days setting forth any facts relied on to show this determination was not correct. Plaintiff responded by a letter which asked for a hearing but did not state any reason for his absence from work. The Acting Superintendent thereafter informed him that the affidavit failed to establish that his absence was not in violation of the Taylor Law and that therefore his objection was denied. On his October pay check a deduction was made for the four days in which he had not been performing his duties, a deduction which was not disputed. The November and December pay checks deducted also the amount paid for four additional days as a penalty under the Taylor Law. Plaintiff's attack is based primarily on an alleged lack of procedural due process and lack of

## Appendix I

an impartial hearing before deduction from wages, which plaintiff considers to be a garnishment of wages. *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820 (1969). He asserts also that the Board of Education could not provide him an impartial decision because all its members had a pecuniary interest in the decision. *Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689 (1973) and *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S.Ct. 80 (1972). The alleged pecuniary interest is said to result from the fact that the Superintendent of Schools and all his assistants and advisors have a responsibility to balance the school budget, to determine expenditures, and to seek sources of revenue, and therefore they cannot act in a detached manner in determining the guilt or innocence of affected employees.

**Discussion**

1. The service of process conforms substantially with Rule 4(d)(3) of the Federal Rules of Civil Procedure. Since the summons and complaint reached the responsible officials, the Court will not require re-service.

2. The claim of jurisdiction over the Board of Education under 42 U.S.C. § 1983 raises difficult questions. Since the decision of the Supreme Court in *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S.Ct. 222(2) (1973), a number of courts have decided that a school board is not a "person" under § 1983. *Patton v. Conrad Area School District*, 388 F. Supp. 410 (D. Del. 1975); *Seaman v. Spring Lake Park Independent School District*, 387 F. Supp. 1168 (D. Minn. 1974); *Weathers v. West Yuma County School District*, 387 F. Supp. 552 (D. Colo. 1974); *Howell v. Winn Parish School Board*, 377 F. Supp. 816 (W.D. La. 1974).

## Appendix I

This circuit has not dealt directly with the issue. *Newman v. Board of Education*, 508 F.2d 277 (2d Cir.), *cert. denied*, U.S. , 95 S.Ct. 1447 (1975); *Lombard v. Board of Education*, 502 F.2d 631 (2d Cir. 1974), *cert. denied*, U.S. , 95 S.Ct. 1400 (1975); *Vega v. Civil Service Commission*, 385 F. Supp. 1376 (S.D.N.Y. 1974).

Lack of jurisdiction under § 1983 cannot be cured in this case by 28 U.S.C. § 1331, since the necessary \$10,000 jurisdictional amount for federal question jurisdiction does not exist.

3. The complaint is not in conformity with F.R. Civ. P. 8(a)(2), which requires "a short and plain statement of the claim". In the absence of objection by the defendant on that ground and in the interest of expedition and economy, this court will nevertheless proceed to the merits.

4. Even if the deduction is treated as a garnishment, it does not constitute a violation of the *Sniadach* rule if plaintiff was entitled to a judicial hearing before a deduction. The purpose of a hearing, moreover, is not just to listen to people talk but to decide issues of fact or law. In this case there is no dispute that plaintiff engaged in an unauthorized strike. His own complaint states on page 5 that there was a work stoppage at the Plainview-Old Bethpage School District on September 6, 7, 8 and 11, 1972 and it does not deny that he took part in it, as set forth in the notice to him from the Superintendent of Schools. No attack appears to be made on the right of the state to impose a penalty on a teacher who engages in an unauthorized strike.

Plaintiff's failure to dispute his participation in the strike is not excused by the fact that he believed that the Board of Education could not give him an impartial hearing. In the first place, his case is not supported by the cases he cites. There is no indication that any school official had a

## Appendix I

personal pecuniary interest which would be affected by whether plaintiff's absence from work was authorized or excusable, as was the case in *Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689 (1973). In the second place, the provision for judicial review of any administrative decision under Article 78 of the New York Civil Practice Law and Rules would permit determination of this point. Plaintiff was offered the right to proceed under Article 78 and did not do so. A bargaining unit for the teachers filed a 78 proceeding, which was unsuccessful and which has not been appealed. There is no indication in the record that the deduction from plaintiff's salary would have been made prior to a determination in an Article 78 proceeding if he had used that procedure.

Being supported by an affidavit, defendant's motion should be treated as one for summary judgment. F.R. Civ. p. 12(b)(6). Since there are no material issues of disputed fact, motion should be granted.

It is ORDERED that defendant's motion to dismiss the complaint be granted and that the Clerk of the Court enter judgment dismissing the complaint.

**APPENDIX II**

## UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

---

 HARVEY S. KORNIT,

Plaintiff,

—against—

 BOARD OF EDUCATION,  
 PLAINVIEW-OLD BETHPAGE SCHOOL DISTRICT,  
 PLAINVIEW, NEW YORK,

Defendant.

---

 No. 75 Civ. 518

May 11, 1976

## Appearances:

 HARVEY S. KORNIT  
 Plaintiff, *pro se*

 JOSEPH W. CAMPANELLA, Esq.  
 GREGORY J. GUERCIO, Esq.  
 Attorneys for Defendant

---

 The Late HONORABLE ORRIN G. JUDD  
 District Judge

JUDD, J.:

**MEMORANDUM AND ORDER**

During the pendency of an appeal from this court's order dismissing the complaint, the plaintiff in this civil rights action has moved to amend the complaint to add the names of new parties defendant.

*Appendix II*

The motion was referred to one of the other judges of this court, and returned to the file without being submitted to this judge until plaintiff inquired about the matter recently.

The moving papers set forth the claim of liability against the new defendants in only general terms, and without including a proposed amended complaint. The attorney for the defendant Board of Education has opposed the motion. Permitting an amendment at this stage, by adding additional parties, and waiting for them to be served and to file an answer or make a motion, would further delay the case, and does not appear to be essential to the determination of the pending appeal.

It is ORDERED that the motion to amend the title be denied.

**APPENDIX III**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE SECOND CIRCUIT**

No. 519—September Term, 1975

(Argued June 18, 1976—Decided September 15, 1976)

Docket No. 75-7540

HARVEY S. KORNIT,

Appellant,

v.

BOARD OF EDUCATION,  
 PLAINVIEW-OLD BETHPAGE SCHOOL DISTRICT,  
 PLAINVIEW, NEW YORK,

Appellee.

Before:

MANSFIELD, OAKES and GURFEIN,  
*Circuit Judges*

Appeal from judgment of the United States District Court for the Eastern District of New York, Orrin G. Judd, *Judge*, dismissing claim that local school board acted in violation of due process by imposing penalties on striking teachers without prior judicial review.

*Appendix III*

Judgment vacated; cause remanded with instructions to dismiss for lack of jurisdiction.

HARVEY S. KORNIT,  
 Appellant Pro Se

JOSEPH CAMPANELLA,  
 Plainview, N.Y. for Appellee

PER CURIAM:

Appellant, a teacher in the Plainview-Old Bethpage School system, filed this suit in the United States District Court for the Eastern District of New York to recover \$379.84 deducted from his wages for his participation in an illegal strike against the school system in September, 1972. This sum was deducted by the school board pursuant to its authority to impose penalties against illegal strikers under New York's Taylor Law. N.Y. Civil Service Law §§ 210(2)(d),(g) (McKinney 1973).<sup>1</sup> Appellant contends

<sup>1</sup> Strikes by public employees are expressly unlawful under N.Y. Civil Service Law § 210(1) (McKinney 1973). Illegal strikers are subject to penalties, including loss of tenure. *Id.* § 210(2)(f), as well as payroll deductions, *Id.* § 201(2)(g) (*sic*). The determination of an illegal strike is to be made in the first instance by the local school board. *Id.* § 210(2)(d). After this determination, the affected teacher has 20 days to file a notice of objections with the board. *Id.* § 210(2)(h). If the notice of objections raises a material issue of fact, the board is to set the matter for a hearing before a hearing officer empowered to reverse the board's findings. *Id.* In the present case, appellant's notice of objections raised no claim of fact which "would establish that the employee did not violate (the no-strike law)" *Id.* Therefore, a hearing was not accorded appellant.

## Appendix III

that action of the school board violated due process because its members, representing the fiscal interests of the local government, were not impartial decision-makers. See, e.g. *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). Appellant also argues that the summary deduction of the penalty from his wages constituted a garnishment which he claims cannot be constitutionally imposed without a plenary court proceeding. See e.g. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

The suit against the Plainview-Old Bethpage Board of Education is brought under the Civil Rights Act, 42 U.S.C. § 1983, with jurisdiction, alleged under 28 U.S.C. § 1343(3). The district court, the late Orrin G. Judd, Judge, granted appellee's motion to dismiss the complaint, ruling against appellant on both his substantive claims. Since we find that the district court was without jurisdiction of the subject matter in this case, we vacate the judgment below and remand with instructions to dismiss therefore.

The first requisite for federal subject matter jurisdiction under 28 U.S.C. § 1343(3) and its substantive counterpart, 42 U.S.C. § 1983, is that the entity accused of depriving plaintiff of his civil rights be a "person". While the definition of this term has caused substantial controversy since its limitations in *Monroe v. Pape*, 365 U.S. 167 (1961), this court has recently and explicitly decided that a board of education is not a "person" for purposes of § 1983. *Monell v. Department of Social Services*, 532 F.2d 259, 263-64 (2d Cir. 1976, petition for cert. filed, 45 U.S.L.W. 3005 (U.S. July 2, 1976) (No. 75-1914)). Under *Monell, supra*—whether or not each of us agrees with the exposition of legislative history by Mr. Justice Douglas for the Court in *Monroe v.*

## Appendix III

*Pape, supra*, 365 U.S. at 187-92,<sup>2</sup> on which the *Monell* panel relied—this court has no subject matter jurisdiction to award relief against the Plainview-Old Bethpage Board of Education.<sup>3</sup>

Judgment vacated, with instructions to dismiss for lack of subject matter jurisdiction.

<sup>2</sup> See *Brault v. Town of Milton*, 525 F.2d 730, 744 n.6 (2d Cir. 1975) (dissenting opinion).

<sup>3</sup> As a pro se pleading the complaint is to be read liberally. *Haines v. Kerner*, 404 U.S. 519 (1972) (per curiam). We would find subject matter jurisdiction under another statute, therefore, if a factual predicate for such action could be gleaned from the record. See *Lewis v. D.C. Dep't of Corrections*, 533 F.2d 710, 711 (D.C. Cir. 1976) (per curiam); *Williams v. Vincent*, 508 F.2d 541, 543 (2d Cir. 1974). No alternate jurisdictional basis, however, appear to exist in this case.

**APPENDIX IV****UNITED STATES COURT OF APPEALS****FOR THE SECOND CIRCUIT**

At a Stated Term of the United States Court of Appeals,  
in and for the Second Circuit, held at the United States  
Court House, in the City of New York, on the nineteenth  
day of July, one thousand nine hundred and seventy-seven.

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HARVEY S. KORNIT,

Appellant,

v.

BOARD OF EDUCATION OF PLAINVIEW-OLD BETHPAGE  
SCHOOL DISTRICT,

Appellee.

---

75-7540

A motion having been made herein by Appellant pro se  
for rehearing

Upon consideration thereof, it is

Ordered that said motion be and it hereby is **DENIED**.

Signature

.....  
Walter R. Mansfield, U.S.C.J.

Signature

.....  
James L. Oakes, U.S.C.J.

Signature

.....  
Murray I. Gurfein, Circuit Judges

**APPENDIX V****UNITED STATES DISTRICT COURT****EASTERN DISTRICT OF NEW YORK**


---

HARVEY S. KORNIT,

Plaintiff,

v.

BOARD OF EDUCATION PLAINVIEW-OLD BETHPAGE  
SCHOOL DISTRICT NEW YORK,

Defendant.

---

No. 75-C-518

**Order**


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Sept. 15, 1977

---

COSTANTINO, D.J.

Pursuant to the Court of Appeals decision in this case,  
the action is hereby dismissed for lack of subject matter  
jurisdiction. So ordered.

Signature

.....  
U.S.D.J.

## APPENDIX VI

## MEMORANDUM DECISION AND ORDER

## SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK  
Washington, D.C. 20543

June 26, 1978

Harvey S. Kornit  
70-25 Yellowstone Boulevard  
Forest Hills, N.Y. 11375

Re: HARVEY S. KORNIT  
v. BOARD OF EDUCATION OF PLAINVIEW-  
OLD BETHPAGE SCHOOL DISTRICT,  
Plainview, New York  
No. 77-532

Dear Mr. Kornit:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. (1978).

Very truly yours,

MICHAEL RODAK, JR., Clerk

By /s/ EDWARD FAIRCLOTH  
Assistant Clerk

## APPENDIX VII

## UNITED STATES COURT OF APPEALS

## SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-eight day of July, one thousand nine hundred and seventy-eight.

Present:

HON. WALTER R. MANSFIELD  
HON. JAMES L. OAKES  
HON. MURRAY I. GURFEIN  
*Circuit Judges.*

HARVEY S. KORNIT,  
Plaintiff-Appellant,

v.

BOARD OF EDUCATION, PLAINVIEW-OLD BETHPAGE  
SCHOOL DISTRICT, PLAINVIEW, NEW YORK,  
Defendant-Appellee.

Filed July 28, 1978

75-7540

The action herein having been taken to the Supreme Court of the United States by writ of certiorari and a certified copy of the judgment and a copy of the opinion of the said court having been received and filed, vacating the judgment

*Appendix VII*

of this court with costs and remanding the said action to this court for further consideration in light of *Monell v. Dep't. of Social Services of the City of New York*, 436 US — (1978) and providing that the appellant, Harvey S. Kornit, recover from the appellee, Board of Education, Plainview Old Bethpage School District, Plainview, New York, One Hundred Dollars (\$100.00) for his costs therein expended

Upon consideration thereof, it is

Ordered that the judgment of this court of September 15, 1976, and the mandate issued thereunder be and they hereby are vacated and that Harvey S. Kornit shall recover from the Board of Education, Plainview Old Bethpage School District, Plainview, New York, One Hundred Dollars (\$100.00) for his costs in the Supreme Court of the United States.

A. DANIEL FUSARO,  
Clerk

By: /s/ Arthur Heller  
ARTHUR HELLER,  
Deputy Clerk

**APPENDIX VIII****UNITED STATES COURT OF APPEALS**

FOR THE  
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourth day of October one thousand nine hundred and seventy-eight.

Present:

HONORABLE WALTER R. MANSFIELD,  
HONORABLE JAMES L. OAKES,  
HONORABLE MURRAY I. GURFEIN,  
*Circuit Judges.*

HARVEY S. KORNIT,

Appellant,

—against—

BOARD OF EDUCATION, Plainview-Old Bethpage  
School District, Plainview, New York,

Appellee.

Filed Oct. 4, 1978

Dkt. No. 75-7540

The action herein having been taken to the Supreme Court of the United States by writ of certiorari and a certi-

## Appendix VIII

fied copy of the judgment and copies of the opinion of the said court having been received and filed vacating the judgment of this court and remanding the said action to this court for further consideration in light of *Monell v. New York City Dept. of Social Services*, — U.S. —, 46 U.S.L.W. 4569 (June 6, 1978),

Upon consideration thereof, it is,

ORDERED, that the judgment of this court of September 15, 1976, be and it hereby is vacated; and it is

FURTHER ORDERED, that the judgment of the district court dismissing the complaint be and it hereby is affirmed, substantially for the reasons stated by the late Judge Orrin G. Judd, beginning at page 5, paragraph 4 of his Memorandum and Order dated July 22, 1975. The school officials involved did not have a sufficient pecuniary interest to disqualify them. See *Hortonville Joint School District No. 1, et al. v. Hortonville Education Assn., et al.*, 426 U.S. 482, 491-92 (1976). The procedure provided by N.Y. Civil Service Law § 210 does not amount to a garnishment without hearing or court order in violation of *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

Signature

.....  
Walter R. Mansfield, U.S.C.J.

Signature

.....  
James L. Oakes, U.S.C.J.

Signature

.....  
Murray I. Gurfein, U.S.C.J.

## APPENDIX IX

## UNITED STATES COURT OF APPEALS

## SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourteenth day of November, one thousand nine hundred and seventy-eight.

Present:

HON. WALTER R. MANSFIELD

HON. JAMES L. OAKES

HON. MURRAY I. GURFEIN

Circuit Judges.

—————  
HARVEY S. KORNI, Plaintiff-Appellant,

vs.

BOARD OF EDUCATION, PLAINVIEW-OLD BETHPAGE  
SCHOOL DISTRICT PLAINVIEW, NEW YORK,

Defendants-Appellees.

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Filed Nov. 14, 1978

Docket No. 75-7540

A petition for a rehearing having been filed herein by the plaintiff-appellant, *pro se*

Upon consideration thereof, it is

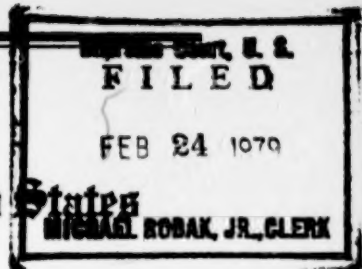
Ordered that said petition be and hereby is denied.

/s/ A. Daniel Fusaro

A. DANIEL FUSARO

Clerk

IN THE  
**Supreme Court of the United States**  
October Term, 1978



**No. 78-1083**

**HARVEY S. KORNIT,**

*Petitioner,*

*against*

**BOARD OF EDUCATION of the  
PLAINVIEW-OLD BETHPAGE SCHOOL DISTRICT  
PLAINVIEW, NEW YORK,**

*Respondent.*

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**SUPPLEMENT TO THE PETITION FOR A WRIT OF  
CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE SECOND CIRCUIT**

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**HARVEY S. KORNIT**

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**Forest Hills, New York 11375**

**Tel. No. 212-261-8578**

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**SUPPLEMENT TO THE PETITION FOR A WRIT OF  
CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE SECOND CIRCUIT**

In conformity with Rule 24(5) of the Rules of the Supreme Court of the United States, the petitioner, Harvey S. Kornit, respectfully submits a Supplement to his Petition for a Writ of Certiorari.

The petitioner wishes to call to the attention of the United States Supreme Court two related cases, and the recent court decision in one of these cases. The decision was made after the Petition for a Writ of Certiorari was brought to the printers. The petitioner was recently advised of the decision.

1. The United States District Court for the Southern District of New York in *Starrs et al. v. Bock et al.*, 77 Civ. 5435, in a Memorandum Decision dated December 21, 1978, in part stated the following:

"Plaintiffs have alleged no facts which make this case distinguishable from *Kornit*. Accordingly the court must conclude that plaintiffs have made an insufficient showing of pecuniary bias either to excuse their failure to exhaust their administrative remedies or to prevail on the merits of their constitutional claims."

The decision in *Starrs v. Bock* is based considerably on the Decision of the United States District Court for the Eastern District of New York, the late Honorable Orrin G. Judd, in the current action as indicated on Page 15 of the Memorandum Decision, which is unreported.

2. The United States District Court for the Southern District of New York, however, in its Decision in *Starrs v. Bock*, *supra*, makes a significant acknowledgement.

The District Court, in Footnote 7, stated the following:

"As in *Arnett*, the Court of Appeals in *Sanford v. Rockefeller*, *supra*, was principally concerned with the constitutionality of the Taylor Law, No. 210.2 insofar as it permitted the imposition of the penalties of withholding double pay and loss of tenure without a prior hearing. The Court of Appeals upheld the act. The parties apparently did not raise, and the court did not consider, whether the statute's authorization of the school district superintendent to make the initial determination was a separate and distinct violation of the due process clause, *nor did the briefs filed on appeal with the Supreme Court appear to have raised this issue*. See Nos. 74-1178, 74-1193, 42 U.S.L.W. 3557 (April 15, 1975). *The court must thus conclude that the issue of the Superintendent's pecuniary bias was not before the Supreme Court when it summarily dismissed the Sanford appeal.*" (Italics added)

The petitioner in the current action bases his position primarily on the pecuniary bias of the Board of Education and the Superintendent of Schools (or Acting Superintendent of Schools). It must be noted that *Sanford v. Rockefeller*, *supra*, was *not* concerned with a school district or with a superintendent of schools, although the principle involved may be similar.\*

3. A similar Taylor Law case, *Wolkenstein et al. v. Reville et al.*, 77 Civ. 618, is currently before the United States District Court for the Western District of New York and a decision is pending.

4. The New York Educators Association of the National Education Association, which filed the suits on behalf of the complainants in *Starrs v. Bock*, *supra*, and in *Wolkenstein v. Reville*, *supra*, has indicated by letter to this petitioner that it is prepared to file a brief, as *Amicus Curiae*, in support of the petitioner should the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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\* *Sanford v. Wilson (Carey)*, 416 U.S. 977 (1974), 421 U.S. 973 (1975), on appeal from the New York State Court of Appeals.